

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAR 28 1991

MEMORANDUM

SUBJECT: Determining Compliance Dates for Individual Control Strategies Issued Pursuant to Clean Water Act §304(1)

FROM: James R. Elder, Director
Office of Water Enforcement and Permits

TO: Water Management Division Directors
Regions I-X

Section 304(1) of the Clean Water Act provides that individual control strategies (ICSs) require compliance "as soon as possible, but not later than 3 years after the date of the establishment of such strategy." While compliance dates should always be as soon as possible, in some cases, compliance may not be possible in less than three years. Because the 3-year compliance period is triggered by the date of the establishment of the ICS, determining the date of the establishment of the ICS is essential to determining the latest possible compliance date for the ICS.

In the preamble to the June 2, 1989 rule, EPA was not clear about what constitutes establishment of an ICS. On the one hand we implied that an ICS is established at the time the ICS is submitted by a State to EPA, i.e., February 4, 1989 (where the ICS was submitted on time). 54 FR 23868 at 23888. Elsewhere in that preamble, we implied that an ICS is established when EPA approves it, i.e., June 4, 1989 (where the ICS is submitted and approved on time). 54 FR 23868 at 23869. Where EPA is the permitting authority, the preamble implied that establishment of the ICS occurs at the time EPA issues the draft permit.

As the Regions implement ICSs through issuance of final permits or approval of State-issued permits, the question of what is the date of establishment and therefore what is the latest appropriate compliance date is becoming more pressing. This should only become an issue when the Region is considering a compliance date later than June 1992 for ICSs approved in June 1989 or later than June 1993 for ICSs disapproved in June 1989. The June 1992 and June 1993 compliance dates seem clearly to meet the statutory requirement for compliance within three years of

establishment because the statute does not require establishment before 1989 (or 1990 when EPA disapproved the State submission). The purpose of this memorandum is to identify what I believe are the objectives that Regional Offices should consider in determining the dates that ICSs become established and what are appropriate dates for compliance.

Because the Agency has not promulgated a regulation interpreting when an ICS is established pursuant to §304(1), each Region will have flexibility in determining, as a factual matter, the date of establishment. There are a number of reasonable ways to apply the statute and therefore reasonable dates that the Regions could select as the date of establishment for different ICSs.

The Regional Offices should make their determinations of the dates of establishment after evaluating the objectives outlined below. Using a common set of objectives, the decisions from Region to Region will be based on the same underlying principles. Below is a discussion of what I believe to be the considerations that should be balanced in determining ICS establishment dates.

- First, compliance with ICSs should occur as soon as possible. This is consistent with §304(1) which contemplates the implementation of regulatory controls on the discharge of toxics within the 5-year permitting cycle.
- Second, an important national objective is to group all ICS compliance dates for similarly situated dischargers as closely as possible. Otherwise, we risk creating a competitive advantage for some dischargers.
- Third, the date chosen for the establishment of the ICS, and the basis therefore for determining the latest possible compliance date for the ICS, should be made clear in the ICS decision, although in many cases it can be easily implied from the choice of compliance date. EPA must explain its rationale for choosing a compliance date in a permit. This will minimize confusion and ensure that a case-by-case rationale for the Region's choice is available.
- Fourth, the date chosen for the establishment of the ICS should not encourage needless litigation as might happen if simply bringing an administrative challenge would stay the compliance dates.
- Fifth, the determination of the date of the establishment of the ICS may consider issues related to the overall process available in a particular ICS development. For example, a Region might revise the

date of the establishment of the ICS from notice of a draft permit to issuance of a final permit if the limitations were significantly changed between draft and final. Or, a Region could consider whether there was a full opportunity to comment at the State level before EPA's approval process started.

There is a broad range of dates the Regional Office could choose as the date of the establishment of an ICS. Arguably, these dates could range from the date the Region first notifies the permittee of the necessary effluent limitations (prior to public comment), or EPA receives a draft permit from the State, to the date EPA issues a final permit or approves a final State permit. For most ICSSs, the most appropriate date of establishment is somewhere between these dates.

The two sets of dates at the ends of the range of possibilities above - two very early in the process and two very late - do not achieve the five objectives. The first dates of establishment fall very early in the §304(1) process, when the effluent limits are first calculated. Defining the establishment date so early helps achieve one goal of §304(1) - early compliance. Yet, it is not a well defined point in the process, it may result in a competitive advantage for dischargers whose ICSSs contain later compliance dates, and all of the public process occurs after the establishment of the ICS. The second dates of establishment are dependant on a well defined point - permit issuance. Yet they could allow a prolonged period to comply, which is not consistent with one principal goal of §304(1). Moreover, because these dates are so late in the §304(1) process, they could very well provide the discharger with a competitive advantage.

Two examples of establishment date determinations which might better meet the five objectives follow. First, the date of establishment could be the date on which EPA approved the ICS (or, where EPA is the permit issuing authority, the date on which EPA made the draft permit available for public comment). In this example, the establishment date is early enough in the §304(1) process for compliance to be achieved within the 5-year permitting cycle. Where several Regions choose this approach, it minimizes the potential for competitive advantage. Further, unfounded challenges could not be used to postpone compliance. Last, a public review process is normally available before approval of the ICS.

In a second example, EPA disapproves the ICS and the date of establishment is determined to be the date of EPA issuance of the new draft permit for public comment. This establishment date is relatively early in the §304(1) process. If the notification of the new draft permit occurs soon after disapproval of the ICS, the potential for competitive advantage among dischargers will be

minimized. The establishment date will be well defined. And by choosing this date, EPA will create an incentive for dischargers to work with EPA to finalize the effluent limitations in the ICS, thus minimizing the potential for the discharger to challenge the ICS. Finally, there will normally have been an opportunity for public comment on the listing and the ICS disapproval before the draft permit is developed.

I do not wish to either require or foreclose any of the possibilities described in the examples above. Case-specific circumstances may compel differing findings of when the establishment of the ICS occurs. Let me reiterate, however, that compliance with ICSs should be as soon as possible. In some cases it may be necessary to determine that ICS establishment occurs at the time of final permit issuance, but this should be very rare. We want to avoid prolonging compliance periods where it is not warranted. I urge you to consider the objectives outlined in this memorandum when determining establishment dates for any remaining unfinished ICSs you have. I understand that a number of these considerations have already gone into the decisions you have made.

Please let me know if you have any questions, or have your staff contact Rob Wood in Permits Division at 475-9534 or Diane Regas in Office of General Counsel at 382-7713.

cc: Regional Counsels, Regions I-X

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